

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

retired from the employing establishment effective March 31, 1998. On the CA-2 the employing establishment indicated that he first reported his condition to a supervisor on August 5, 2014, the date he filed his CA-2.

OWCP received various employee personnel records dating back to June 1973. Appellant also provided a description of his job titles and the various duties he performed for the employing establishment between 1973 and 1998. OWCP also received the results of various audiograms, including a June 26, 1973 preemployment study. The evidence included a summary of the results of at least 18 audiograms that were administered as part of the employing establishment's hearing conservation program. The latest employer-administered audiogram was dated March 26, 1998. Additionally, appellant submitted the results of a May 7, 2014 audiogram.

By decision dated October 2, 2014, OWCP denied appellant's hearing loss claim as untimely filed. It identified January 1, 1993 as the date of injury, and noted that he retired effective "March 31, 1993." Appellant did not file his claim until August 5, 2014, and the evidence did not support that his immediate superior had actual knowledge within 30 days of the date of injury.

### **LEGAL PRECEDENT**

An original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>2</sup> A claim filed outside this time frame must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.<sup>3</sup> In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by the exercise of reasonable diligence should have been aware of the causal relationship of the compensable disability to his employment.<sup>4</sup> An employee with actual or constructive knowledge of his or her employment-related condition, who continues to be exposed to injurious working conditions, must file a claim within three years of the date of last exposure to the implicated conditions.<sup>5</sup>

A positive test result from an employing establishment program of regular audiometric examination as part of a hearing conservation programs is sufficient to establish knowledge of a hearing loss so as to put the immediate superior on notice of an on-the-job injury.<sup>6</sup>

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<sup>2</sup> *Id.* at § 8122(a).

<sup>3</sup> *Id.* at § 8122 (a)(1).

<sup>4</sup> *Id.* at § 8122(b).

<sup>5</sup> *E.g., James A. Sheppard*, 55 ECAB 515, 518 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993).

<sup>6</sup> *See James A. Sheppard, id.*; Federal (FECA) Procedure Manual, *id.*

## ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant claimed to have been aware of his employment-related hearing loss on or about January 1, 1993. Based on his reported employment history, appellant's occupational noise exposure continued until his retirement effective March 31, 1998. After retiring, appellant waited more than 16 years before filing the current occupational disease claim. Clearly, he did not file his claim within three years of the date of last exposure to the implicated conditions. Under the circumstances, appellant's claim must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.

In finding there was no evidence that appellant's immediate superior had actual knowledge of his injury, OWCP failed to acknowledge that, for more than two decades, appellant regularly participated in the employing establishment's hearing conservation program.<sup>7</sup> The October 2, 2014 decision incorrectly stated that only two diagnostic tests (audiograms) had been received, which were dated May 13, 1997 and May 7, 2014.<sup>8</sup> As noted, the record includes the results of at least 18 employer-administered audiograms through March 26, 1998. If any of the conservation program test results were positive, this would suffice for purposes of establishing that appellant's immediate superior received notice of an on-the-job injury.<sup>9</sup>

Because OWCP failed to address the evidence regarding the employing establishment's hearing conservation program, the case shall be remanded for further development. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

## CONCLUSION

The case is not in posture for decision.

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<sup>7</sup> Appellant's counsel initially raised this issue in an August 19, 2014 letter to OWCP.

<sup>8</sup> OWCP also incorrectly noted that appellant retired in "1993," rather than March 31, 1998.

<sup>9</sup> The procedure manual provides in relevant part:

"If the employing agency gave regular physical examinations which might have detected signs of illness (for example, regular x-rays or hearing tests), the agency should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results. [If the claimant was still exposed to employment hazard on or after September 7, 1974 and the agency's testing program disclosed the presence of an illness or impairment, this would constitute actual knowledge on the part of the agency, and timeliness would be satisfied even if the employee was not informed...]."

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 2, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: February 27, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board